Nos. 97-400 & 97-430

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, *et al.*,

Petitioners,

vs.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., *et al.*,

Respondents.

ROBERT C. SHINN, JR., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection,

Petitioner,

vs.

ATLANTIC COAST DEMOLITION & RECYCLING, INC.; C & A CARBONE, INC.; NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; WASTE MANAGEMENT ASSOCIATION OF NEW JERSEY,

Respondents.

On Petitions for Writ of Certorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ATLANTIC COAST DEMOLITION & RECYCLING, INC.

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30 pp

LIST OF PARTIES

Respondent accepts the list of parties submitted by petitioners.

LIST OF PARENT AND RELATED CORPORATIONS

At the commencement of this action, Atlantic Coast Demolition & Recycling, Inc. was a wholly owned subsidiary of United Waste Systems, Inc., a public company. During the pendency of this litigation, Atlantic Coast was sold to private owners by United Waste; however, United Waste retained an interest in the outcome of this litigation. Another public company, USA Waste Services, Inc., subsequently acquired United Waste as its wholly-owned subsidiary, and as a result has succeeded to United Waste's interests in this litigation.

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I

Respondent Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") respectfully requests that this Court deny the petitions for writ of certiorari filed by petitioners Essex County Utilities Authority, Hudson County Improvement Authority, Mercer County Improvement Authority, and Passaic County Utilities Authority ("County Authorities") and by petitioner Robert C. Shinn, Jr., the Commissioner of the New Jersey Department of Environmental Protection ("New Jersey" or "the State"), seeking review of the Third Circuit's decisions in this case. Those opinions are reported at 48 F.3d 701 (3d Cir. 1995) and 112 F.3d 652 (3d Cir. 1997).

STATEMENT OF THE CASE

This four year old litigation concerns the constitutional validity of a single set of New Jersey regulations, N.J. Admin. Code. tit. 7, § 26-6.5, *et seq.*, directing where all solid waste generated in the State by public or private parties must be processed and disposed. In 1993, Atlantic Coast, a Pennsylvania corporation which operates a transfer station and a center for processing, recycling and disposing of construction and demolition ("C&D") waste in Philadelphia, commenced this action in the United States District Court for the District of New Jersey. Atlantic Coast's suit sought declaratory and injunctive relief halting enforcement of New Jersey's "flow control" regulations, which kept it from gaining entrée into the market for processing C&D waste originating in New Jersey, on the ground that these regulations violate the dormant Commerce Clause of the United States Constitution. Pet. App. 3-4, 15-16.[1]

Under the "flow control" system, each of the 22 districts in the State was required to develop a ten-year solid waste

1. The appendices filed by New Jersey and the County Authorities contain the same materials in the same order, so Atlantic Coast shall simply cite to these materials as "Pet. App. __".

management plan, providing for "sufficient suitable" disposal facilities to treat and accommodate all solid waste generated within that district, either by contracting with public or private entities or by constructing and operating their own waste facilities. Each waste management plan, which is subject to approval or disapproval by the Commissioner of DEP, must designate where the waste generated within each municipality in that district will be processed and ultimately disposed. In addition, each processing or disposal facility is subject to state regulation, including registration and approval by the Department of Environmental Protection ("DEP") and issuance of a certificate of public convenience and necessity by the Board of Regulatory Commissioners. Only those facilities included in a district plan can receive operating permits or accept waste from that district. These designations are then codified as the "waste flow" regulations, which permit DEP and the individual districts to direct the flow of waste generated within each municipality in each district. N.J. Admin. Code. tit. 7, § 7:26-6.5. Pet. App. 8-12.

DEP candidly admitted that its twin "goals of 60% recycling and disposal self-sufficiency for the nonrecyclable waste stream . . . form the core of New Jersey's current solid waste management system and constitute the statewide solid waste management objectives, criteria and standards with which the [district] plans must be consistent." Accordingly, the district court found:

> . . . the D.E.P.E. administers the law with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state. The 1993 solid waste management state plan update, which was admitted into evidence and herein referred to as the Update, provides: "As a move toward achievement of

> self-sufficiency in disposal capacity. The Department's objective is to eliminate reliance on out-of-state disposal within a seven-year period."

Pet. App. 13-14.

Before bringing this action, Atlantic Coast sought to gain access to the New Jersey market for processing and disposal of C&D waste, but was unable to gain access to any district "flow control" plan because it was located out-of-state. Pet. App. 17.

The district court originally judged Atlantic Coast's Commerce Clause claims under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and, after conducting an evidentiary hearing, entered judgment in favor of defendants. Atlantic Coast then appealed.

While its appeal was pending, the Supreme Court handed down its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *Carbone* arose from a similar flow control ordinance in Clarkstown, and the Court concluded that the Clarkstown ordinance discriminated against interstate commerce by hoarding solid waste and the demand for its disposal. 511 U.S. at 392. Therefore, *Carbone* held that its constitutionality must be judged under the virtually *per se* invalid test of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which shifted the burden to the government to demonstrate, under rigorous scrutiny, that the discriminatory program was the only means to serve a legitimate, nondiscriminatory interest. 511 U.S. at 392. *Carbone* further rejected all of the rationalizations proffered by Clarkstown, including environmental and financial considerations, and concluded that Clarkstown's "flow control" ordinance did not pass strict scrutiny and was unconstitutional. 511 U.S. at 393-94.

On that appeal (*Atlantic Coast I*), the Third Circuit noted that this Court's decision in *Carbone* "provides significant guidance" in considering Atlantic Coast's then pending appeal, and observed that "New Jersey's flow control regulations accomplish on a district level substantially what Clarkstown's flow control ordinance accomplished on a local level." Pet. App. 22, 27. Reviewing the factual record from the district court, the court of appeals:

> conclude[d] that New Jersey's waste flow regulations, in effect and by design, discriminate against interstate commerce and that heightened scrutiny under the dormant Commerce Clause is required.

Pet. App. 20.

The Third Circuit further considered and rejected DEP's arguments "that New Jersey's regulation of waste disposal through a utility system requires application of the less stringent balancing test" and "that New Jersey is entitled to the market participant exception." Pet. App. 20, 29-39.

The court of appeals then decided that because the district court had decided the case under the Pike balancing test and had no occasion to apply the much stricter *Philadelphia v. New Jersey* test, it remanded the case to the district court to determine whether the government had accomplished "the much more onerous task of demonstrating that there is no alternative to its waste flow control regulations that would accomplish its legitimate objectives," and left to the district court's initial discretion whether to resolve the case on the basis of the current "very substantial record" or to reopen the record to receive additional evidence. Pet. App. 40-42.

On remand, the Atlantic Coast litigation was consolidated with another challenge to the New Jersey "flow control" regulations brought by C & A Carbone, Inc., the National Solid Wastes Management Association and the Waste Management Association of New Jersey ("Carbone plaintiffs"), as well as other parties who were subsequently dismissed from the litigation. The district court also granted the defendants' request to reopen and expand the record, and substantial additional evidentiary submissions were made.

The district court then conditionally, Pet. App. 182-218, and later unconditionally, Pet. App. 219-247, granted Atlantic Coast's renewed motion for a preliminary injunction against enforcement of the "flow control" regulations for C&D waste, while denying certain Carbone plaintiffs' motion to preliminarily enjoin these regulations for all types of solid waste. On July 15, 1996, following a trial on the merits, the district court found:

> Defendants have not even come close to proving that a constitutional, nondiscriminatory alternative cannot address the various interests . . . as well or better than the current flow control regulations. Indeed, defendants have not even attempted to present a feasible nondiscriminatory alternative to the Court . . .

Pet. App. 272. The district court therefore concluded that "New Jersey's system of flow control of waste violates the Commerce Clause of the United States Constitution" and made its preliminary injunction against the enforcement of "flow control" for C&D waste permanent. In addition, it issued a permanent injunction against enforcement of "flow control" for the remainder of the solid waste stream but, unlike its treatment of C&D waste, the district court stayed enforcement of the non-

C&D injunction until two years after the case is no longer subject to appeal or pending review by the Supreme Court.

New Jersey and the County Authorities appealed the portion of the district court's decision finding that the "flow control" regulations were unconstitutional, and the Carbone plaintiffs appealed the district court's post-appeal stay.[2] On that appeal (*Atlantic Coast II*), the court of appeals affirmed the district court's application of the strict scrutiny standard to the New Jersey "flow control" regulations, as well as its factual finding that the defendants did not meet their burden of demonstrating that there were no nondiscriminatory alternatives for achieving its legitimate interest in creating a safe and effective system for in-state solid waste disposal, and, therefore, affirmed the district court's conclusion that the New Jersey "flow control" regulations are unconstitutional. Pet. App. 108, 125-134, 138. The court of appeals, however, reversed the district court's two year post-appeal stay, Pet. App. 143, which did not apply to the permanent injunction barring enforcement of "waste flow" for C&D waste, Pet. App. 291-293.

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari will be granted "only for compelling reasons." Sup. Ct. R. 10. A review of the actual factual record and procedural history of this case should establish that the petitions do not present any grounds for granting certiorari as set forth in Rule 10, and the court of appeals correctly decided the issues in this case. Therefore, Atlantic Coast respectfully submits that this Court deny the petitions for writ of certiorari.

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2. Because Atlantic Coast only processes C&D waste, and the injunction for C&D waste was *not* stayed, Atlantic Coast was not a party to the Carbone plaintiffs' appeal to the court of appeals on the issue of the stay, and can take no position on New Jersey's petition for certiorari on that matter (Point III).

I.

PETITIONERS HAVE CONCEDED THAT THE CIRCUMSTANCES OF THIS CASE ARE "UNIQUE".

In accordance with Rule 10, one of the factors the Court may consider in deciding whether to grant review is whether the decision below raises issues important to the public, and not merely the particular parties involved in the litigation. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). In weighing the petitioners' claims concerning the importance of the issues, it should be noted that both the County Authorities and New Jersey have consistently, and repeatedly, represented to the courts that New Jersey's system of solid waste management, is unique and fundamentally different from the laws and regulations applied in the other 49 states.

Contrary to the suggestion in the County Authorities' petition for certiorari that "[r]eview of the decision below will afford New Jersey, *and its numerous similarly situated sister States*, the guidance that is so conspicuously lacking in the current case law,"[3] the County Authorities previously sought to distinguish this case from this Court's decision in *Carbone*, by stressing how each Commerce Clause case is fact-intensive and emphasizing the "unique" circumstances here which prevented this case from being controlled by other precedents:

> . . . nothing in the *Carbone* decision reverses the Supreme Court's long-standing position that a Commerce Clause analysis turns upon the factual record established in each case

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3. *County Authorities Pet.* at 18 (emphasis added).

by the Federal District Court. In this matter, the District Court's September 8, 1993 decision is premised upon an *extensive factual record and numerous factual findings* relative to the nature of New Jersey's solid waste management system and its Waste Flow Regulations. As reflected in that record and the lower Court's findings, New Jersey's solid waste management system and Waste Flow Regulations are premised upon *unique factual circumstances* (1) readily distinguishable from those in place in Clarkstown, New York, and (2) having recognized constitutional significance in the context of a Commerce Clause analysis.

* * *

As reflected in its statutes, regulations, the record on appeal and the findings of the Court below, New Jersey's solid waste management system — including its Waste Flow Regulations — are *unique* . . . . the New Jersey Legislature established a *unique* and comprehensive approach to the management of solid waste collection and disposal.

* * *

The State of New Jersey has a long history of regulating solid waste collection and disposal as regulated public utilities. In this regard, *its utility control system is unique among the fifty states.*

Brief on Behalf of Potential Intervenors/Amici Curiae Hudson County Improvement Authority, Passaic County Utilities Authority, and Essex County Utilities Authority in Opposition to Motion for Summary Reversal at 2, 4, 15 (3d Cir. filed June 16, 1994) (emphasis added).[4]

New Jersey similarly stressed the uniqueness of its regulatory system in distinguishing its situation from that of all other states. *New Jersey Pet.* at 5, 14. This followed the State's arguments in the court of appeals emphasizing the unique, rather than common issues, presented by this case.[5]

Having previously represented that the New Jersey system regulating waste disposal arose from, and must be judged in light of, the unique and distinguishing facts of that case, this Court may view with skepticism petitioners' claim that New Jersey's regulatory system is typical or emblematic of the

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4. After the filing of this amici brief, the remaining county authority petitioning for certiorari here — Mercer County Improvement Authority — moved for, and by Third Circuit Order dated August 15, 1994, was granted leave to, participate in the litigation through the same brief and potential argument presented by the other three county authorities.

5. *See Brief of Appellee Commissioner New Jersey Department of Environmental Protection and Energy in Opposition to Appellant's Motion for Summary Action and in Support of Cross-Motion for Acceleration and Stay*, No. 94-5173 (3d Cir. filed June 13, 1994) ("New Jersey's system of solid waste management may be the most comprehensive in the nation. *It stands apart as well due to New Jersey's long and almost unique, history of regulating the solid and hazardous waste industries as public utilities.* The constitutionality of the system cannot be determined without an understanding of this complexity because Commerce Clause analysis turns on the specific purpose, effect and benefit of the provision challenged.") (emphasis added, citations and internal quotation marks omitted); *Merits Brief of Defendant-Appellee Commissioner New Jersey Department of Environmental Protection*, No. 94-5173 (3d Cir. filed July 18, 1994) (same).

treatment of solid waste by other states and that the Third Circuit's rulings following *Carbone* have some special significance going far beyond the borders of that circuit.[6] *See generally Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) (judicial estoppel may prevent litigants from knowingly asserting inconsistent or mutually contradictory positions).

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6. In fact, the decisions in *Atlantic Coast* do not necessarily mandate the end of flow control even within the boundaries of the Third Circuit. As the court of appeals explained in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1265 (1996), it did not read either *Carbone* or *Atlantic Coast I* as establishing a *per se* ruling subjecting *all* flow control ordinances to strict scrutiny. *Harvey & Harvey*, 68 F.3d at 800-802.

Applying its fact-driven analysis for discriminatory purpose or effect, the *Harvey & Harvey* Court overturned one district court's determination that the Chester County, Pennsylvania flow control scheme did not discriminate against interstate commerce and therefore must be measured under the Pike balancing test, while overturning another district court's finding that the Mercer County, Pennsylvania flow control scheme did discriminate against interstate commerce and thus should be judged under the virtually *per se* invalid test of *Philadelphia v. New Jersey*. In fact, the court of appeals explained that a local authority could choose a single provider without impermissibly discriminating against interstate commerce *provided* that the selection process was truly open and competitive and offered truly equal opportunities to in-state and out-of-state businesses. 68 F.3d at 802.

Of course, the problem for petitioners here is that in *Atlantic Coast I* the court of appeals expressly found that New Jersey's designation process was not truly open and competitive, but was intended to favor operators that have facilities already located within, or those that are willing to construct a facility within, the State, and given the State's core goal of waste attaining self-sufficiency, out-of-state facilities do not compete on anything approaching a level playing field. *Atlantic Coast I*, 48 F.3d at 708, 713, 715; *Harvey & Harvey*, 68 F.3d at 800-801.

II.

PETITIONERS HAVE NOT ESTABLISHED AN INCONSISTENCY WITH THIS COURT'S DECISIONS OR CONFLICT WITH OTHER CIRCUIT COURT DECISIONS WARRANTING REVIEW.

An alternative ground for granting certiorari is the existence of an inconsistency or conflict between the decision for which review is sought and either a Supreme Court or another final appellate court decision. Sup. Ct. R. 10. However, as the commentators have explained:

> [t]his means that there must be a real or "intolerable" conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.

Robert L. Stern, et al., *Supreme Court Practice* 167 (7th ed. 1993).

Petitioners attempt to qualify for certiorari here by misconstruing the decisions to create a substantial conflict where none exists.

A. There Is No Inconsistency Between the *Atlantic Coast* Decisions and This Court's "Utility" Cases.

New Jersey suggests that the court of appeals' determination that the State's "flow control" regulation is unconstitutional because it discriminates against interstate commerce improperly "ignored this Court's decisions in the public utility field," citing *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951), and *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997). *New Jersey Pet.* at 17. According

to the State, the decision to implement its "flow control" system as part of a program regulating certain aspects of the waste industry as public utilities, has served to dilute the constitutional standards against which its "flow control" decisions should be scrutinized. Rather than follow the principles laid down by this Court in *Carbone*, the State contends that these cases mandate the use of the Pike balancing test, regardless of the facts of this particular case. Yet on closer examination, a review of these Supreme Court decisions reveals that there is nothing in this Court's Commerce Clause jurisprudence inconsistent with the Third Circuit's decision to apply *Carbone*'s strict scrutiny test, based upon its finding of proven discrimination:

> we do not read the dormant Commerce Clause jurisprudence to suggest that state utility regulation is to be judged by different standards than other state regulation. When state utility regulation is protectionist, the Supreme Court has employed heightened scrutiny; where it is not, a benefits and burdens analysis has been applied.

Pet. App. 29.

More than once in recent years this Court has declared that state utility regulation is "not treated as a special province insulated from our general Commerce Clause jurisprudence." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983); *General Motors Corp. v. Tracy*, 117 S. Ct. at 820 n.8 (quoting and following *Arkansas Electric*). Furthermore, this Court has consistently decided whether to apply a heightened scrutiny test to Commerce Clause challenges to utility regulations based upon whether it did or did not find discrimination against interstate commerce. *Panhandle Eastern*, 341 U.S. at 336-37 (found no discrimination

against interstate commerce, noting that state statute under which state utility commission acted "does not distinguish between an interstate or intrastate agency desiring to operate in a locality served by a utility"); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 (1982) (state utility commission order prohibiting sales of power outside the state struck down under *Philadelphia v. New Jersey* standard as unconstitutional protectionist regulation); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992) (Oklahoma statute requiring in-state utilities to purchase at least 10% Oklahoma-mined coal discriminates against interstate commerce and so will be struck down under virtually *per se* rule of invalidity); *General Motors*, 117 S. Ct. at 828 n.15 (while finding no discrimination under the facts of the case, warning "if a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny, even if it is directed toward a legitimate health and safety goal," citing *Philadelphia*).

In view of both the district court's findings that DEP acts "with the specific goal that all waste generated in New Jersey be disposed of within the borders of the state" and a "key policy objective" is to "move toward achievement of self-sufficiency in disposal capacity" and "to eliminate reliance on out-of-state disposal" within seven years from 1993, Pet. App. 14, 74, and the court of appeals' determination that this policy of self-sufficiency "has favored operators that have facilities within the state or that are willing to construct a facility there," Pet. App. 113, the conclusion that New Jersey's "flow control" system discriminates against interstate commerce cannot be seriously disputed. Pet. App. 15. Accordingly, the application of the strict scrutiny test, rather than the Pike balancing test was clearly consistent with this Court's Commerce Clause jurisprudence and the factual record in this case.

Similarly, the County Authorities' contention that the Court should grant certiorari to resolve "a latent, but nationally significant, conflict" between *Carbone* and *Tracy*, *County Authorities Pet.* at 12, reflects a disregard of this Court's assessment of the question of discrimination in the two cases. In *Carbone*, the Court expressly found discrimination in the "flow control" ordinance and thus applied the heightened scrutiny test. 511 U.S. at 391. This contrasts sharply with the situation in *Tracy* where the claim of discrimination was not proven, but, if established, would have resulted in "a high level of judicial scrutiny," 117 S. Ct. at 828-830 & n.15. It is this factual difference, and not any conflict between the legal reasoning in these two decisions, which accounts for their different outcomes.

Moreover, *Tracy* arose from close to a half-century of state regulation of retail sales of natural gas, which had never been questioned by Congress. 117 S. Ct. 816, 820-22, 827, 829. There has been no equivalent legislative authorization for state-imposed regulation of "flow control." *See Carbone*, 511 U.S. at 407-410 (O'Connor, J., concurring). Thus, while the State may elect to continue to regulate solid waste disposal if it so desires, it must do so in a manner which does not discriminate against interstate commerce.

B. New Jersey's Contention that its Actions Were Immunized Under the Market Participant Doctrine Is Supported by Neither the Facts Nor the Law.

New Jersey also contends that the court of appeals erred in not finding that the State's entire "flow control" scheme is immunized from any constitutional scrutiny under the market participant doctrine. This argument reflects a disregard of both the legal principles and the evidence in the record supporting the court of appeals' decision that New Jersey simply is not

acting as a market participant when it issues its "flow control" directives regulating who may and may not process and dispose of solid waste generated by private businesses and residences and public entities in each district.

In rejecting this defense, the court of appeals explained in *Atlantic Coast I* that in each case where this Court found the market participant doctrine applicable,[7] the government was participating directly in some aspect of the market as a purchaser, seller or producer, and the alleged discriminatory effects on the interstate market flowed from these market actions. Pet. App. 35. The court of appeals then explained that, under this doctrine, a governmental entity which enters the market "may buy or sell what it chooses, to or from whom it chooses, on terms of its choice," but that its participation in the market "does not, however, confer upon it the right to use its regulatory power to control the *actions of others in that market*." Pet App. 38 (emphasis added). The constitutional problem with New Jersey's "flow control" system is that the districts were not limiting their intervention in the market to making choices about the terms under which they were willing to provide waste disposal services to the market. Instead, "[t]he waste flow regulations purport to control the market activities of private market participants" and "require *everyone* involved in waste collection and transportation to bring all waste collected in the district to the designated facilities for processing and disposal." Pet. App. 39 (emphasis added). In issuing these "flow control" regulations, the governmental entities were acting as market regulators, not market participants, Pet. App. 39, thereby losing any immunity from constitutional scrutiny.

In applying this test, the court of appeals was simply following this Court's well-trodden path. *See South-Central Timber*

7. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Workers*, 460 U.S. 204 (1983).

Development, Inc. v. Wunnicke, 467 U.S. 82, 97-98 (1984) ("[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, *but allows it to go no further*. . . . Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule") (emphasis added); *Wyoming v. Oklahoma*, 502 U.S. 437, 459-61 (1992) (State could require state-owned utility, but not privately-owned utilities to purchase coal mined in-state). Nothing cited by the State suggests that a different test should be applied to determine the scope of this doctrine here.

The State does attempt to circumvent these requirements by ignoring or misstating the factual record. It glibly suggests that "New Jersey has removed solid waste disposal services from the commercial arena entirely by providing for those services itself" and "New Jersey is simply purchasing solid waste processing services with its own dollars" *New Jersey Pet.* at 5, 12, citing App. (1995) A-510. Neither statement is supported by the record.

As the State's own Solid Waste Management Plan Update 1993-2002 (1993), issued only months before the commencement of this litigation, states:

> Although the development and implementation of solid waste programs and facilities traditionally has been a public function, the role of the private sector in achieving the policy objectives set forth in this State Plan Update cannot be underestimated. Currently, private companies perform the majority of solid waste collection and disposal functions in the state, including ownership and operation of recycling centers, transfer stations, materials recovery facilities, landfills and incinerators.

App. (1995) A-513.[8] As recently as last month, New Jersey issued a notice of amendments adopted and proposed in response to the anticipated final invalidation of "flow control" estimating that there are approximately 500 commercial solid waste collection and transportation companies affected by its waste disposal rules. 29 N.J. Reg. 4170, 4179 (Sept. 15, 1997).

Nor does the record support New Jersey's claim that the State is simply purchasing solid waste processing services with its own funds. *New Jersey Pet.* at 12. Waste processing services are purchased and paid for by countless private concerns, including "almost 3,000" businesses, such as construction companies registered with the DEP as "self-generators" of waste, as well as hundreds of municipalities. App. (1997) A-357-59.

In short, this is simply not the situation found in *Smithtown*, and the market participant doctrine does not apply to the State's clear regulatory actions determining "waste flow" for all solid waste generated by private or public parties.

C. There Is No Genuine Conflict Between the *Atlantic Coast* Decisions and the Decisions of Other Circuit Courts.

Finally, the County Authorities contend that certiorari should be granted because:

> [i]n the wake of *Carbone*, courts throughout the country have been confronted, if not inundated, with dormant Commerce Clause challenges to state and local waste programs [and] [t]o date, nothing remotely approaching

8. *See also* App. (1997) A-429, 897-899 (private disposal facilities); A-471, 789, 1229 (private transfer stations); A-893-94, 1202 (private recycling facilities); A-357-58, 597-98 (solid waste collection and transportation).

> a consensus on *Carbone*'s meaning and effect has been reached.

County Authorities Pet. at 13.

However, an essential prerequisite to granting certiorari based upon a conflict is that *the decision for which review is sought* is shown to be inconsistent with a Supreme Court decision or in conflict with another final appellate court decision, *see, e.g., Northwest Airlines v. County of Kent*, 510 U.S. 355 (1994). And none of the appellate court cases cited by the County Authorities, *Harvey & Harvey*, 68 F.3d at 802; *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419, 1452 (1996), conflicts with the court of appeals' decisions they seek to review here. Instead, the County Authorities engage in a general discussion pointing out real or perceived differences among various circuit or district court opinions, none of which present a direct conflict with the Third Circuit's decisions in *Atlantic Coast. County Authorities' Pet.* at 13-17.[9]

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9. The County Authorities are misrepresenting the caselaw when they characterize the decision in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1384-85 (8th Cir. 1997), as "taking note of the Third Circuit view, but declining to embrace or reject it." *County Authorities Pet.* at 14. In fact, *Oehrleins* neither referred to the decisions in this case nor stated any disagreement with their rulings. Rather, *Oehrleins* simply noted the principle from *Harvey & Harvey* that where there is a neutral, nondiscriminatory process for designating facilities, the waste management law may not violate the Commerce Clause, even if it results in the designation of an exclusive in-state facility. However, the reason why the Eighth Circuit did not decide the validity of this premise is that it found that the initial designation process in *Oehrleins* simply was not open. Its decision certainly does not rise to the level of a conflict, let alone a serious conflict between the circuits warranting Supreme Court review.

Harvey & Harvey, which was decided by the Third Circuit between *Atlantic Coast I*, 48 F.3d 701 (3d Cir. 1995), and *Atlantic Coast II*, 112 F.3d 652 (3d Cir. 1997),[10] did not conflict with either decision in this case. Rather, *Harvey & Harvey* reviewed the caselaw, including *Carbone* and *Atlantic Coast I*, and distilled the relevant principles governing Commerce Clause challenges to flow control laws, explaining that whether a flow control law is subject to strict scrutiny or the Pike balancing test depends upon a review of the facts showing actual discrimination against interstate commerce. 68 F.3d at 798-801.

SSC Corp. v. Town of Smithtown also is essentially consistent with the decisions striking down the flow control directives here. *Smithtown* involved a challenge to not one but two acts taken by that municipality: (1) a flow control ordinance requiring all residential and commercial garbage generated in that town to be disposed of at the incinerator, where Smithtown charges tipping fees based on the amount of waste dumped; and (2) the creation of a residential garbage collection district which entered into a contract with private haulers to pick up all household waste within the district. *Smithtown*, 66 F.3d at 505. Atlantic Coast has not challenged any contract whereby a municipality picks up all household or municipal waste, so the second issue

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10. Of course, because *Harvey & Harvey* and *Atlantic Coast I* and *Atlantic Coast II* were all decided by the Third Circuit, any purported conflict among these decisions, even if genuine, would not normally constitute a sufficient basis for granting certiorari. *See generally Davis v. United States*, 417 U.S. 333, 340 (1974). Such disagreements, if real, will not be considered to present a reviewable conflict, since any differences are deemed an intramural matter to be resolved by that circuit court itself through en banc panels, *see Jeremy H. By Hunter v. Mount Lebanon School District*, 95 F.3d 272, 280 n. 14 (3d Cir. 1996), or the practice of later panels following decisions of earlier panels, Third Circuit Internal Operating Procedure 9.1; *United States v. Conley*, 92 F.3d 157, 168 & n. 9 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1244 (1997); *Supreme Court Practice* at 177.

in *Smithtown* has no parallel here. However, the first action — Smithtown's enactment of a flow control law enforceable by criminal fines and imprisonment — raised the same general issues as the present case and produced the same outcome. The Second Circuit concluded that the flow control law "clearly constitutes municipal regulation of the waste disposal market, not participation in that market, thus subjecting the ordinance to Commerce Clause scrutiny," and following *Carbone*, concluded that it impermissibly discriminated against interstate commerce and therefore was unconstitutional. *Smithtown*, 66 F.3d 506, 512-514. In addressing the question of the "market participation" doctrine, which is given central importance in the certiorari petitions, the Second Circuit's decision in *Smithtown* expressly reviews and "agree[s] with the Third Circuit" in its formulation of that doctrine in *Atlantic Coast I*. 66 F.3d at 512-513. [11]

USA Recycling, Inc. v. Town of Babylon, which was decided on the same day and by the same Second Circuit panel which decided *Smithtown*, presents no conflict of any kind with the decisions in *Atlantic Coast*. In *Babylon*, the Second Circuit ruled that a municipal decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the strictures of the Commerce Clause because it constitutes market regulation, not market participation, because no private actor could engage in such activity, and added that:

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11. Moreover, the decision in *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without pub. op.*, 29 F.3d 641 (11th Cir. 1994), does not constitute a circuit court decision conflicting with the Second Circuit's decision in *Smithtown*. Because the only *reported* decision was by the district court, which was affirmed in an unreported decision not even considered binding precedent in its own circuit, *see* 11th Cir. R. 36-2, this decision must be considered a district, not circuit court opinion, and certainly not one giving rise to a serious conflict between the circuits.

> states and local governments do not enjoy carte blanche to regulate a market simply because they also participate in that market.

Babylon, 66 F.3d at 1282.

It added, however, that the town's decision to eliminate the commercial collection market and replace it with a contractor selected after an open bidding process in which the town aggressively solicited bidders on a national basis did not constitute discrimination against interstate commerce.[12] Therefore, its actions were subject to constitutional review, and passed scrutiny, under the Pike balancing test. 66 F.3d 1283-84, 1290. The Second Circuit explained:

> Babylon's waste management plan . . . differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this court in *SSC Corp.* In both of those cases, the challenged flow control ordinances required local garbage haulers to buy processing or disposal services from a local facility. In Babylon, local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage service to everyone in the

12. This is, of course, consistent with the Third Circuit's position: "We believe . . . that a local authority could choose a single provider — without impermissibly discriminating against interstate commerce — so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses." *Harvey & Harvey*, 68 F.3d at 802. Thus, even assuming the issue of the constitutionality of selecting a single provider through an open and non-discriminatory selection process were presented by the current petitions for certiorari — which it is not — there is no apparent conflict between the Third Circuit and other circuit courts which have addressed this.

> District. Although taxpayers in the District ultimately foot the bill for these garbage services . . . the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* required, and that rendered those ordinances discriminatory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone*.

Babylon, 66 F.3d at 1283 (citations omitted).

Likewise, any conflicts, real or imagined, with any district court decisions, in this or any other circuit, involving other solid waste systems will not justify the granting of certiorari here. For it is the duty of the courts of appeals, and not the Supreme Court, to maintain uniformity within their own circuits and to supervise decisions of their subordinate district courts. *Supreme Court Practice* at 178.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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